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# PLANT RELOCATION AND THE COLLECTIVE-BARGAINING OBLIGATION

BETTY SOUTHARD MURPHY†

*An employer's decision to relocate or close a plant can have a devastating impact on the affected employees. Similarly, keeping an obsolete and unproductive plant open can have a devastating effect on employers and employees. Thus, plant relocations and closures have become an important problem in all parts of the country, including the South. Unions have attempted to have changes in the operation of a business, including relocations and closures, declared mandatory subjects of bargaining under the National Labor Relations Act, even if the changes are motivated by economic reasons only. In this Article, Mrs. Murphy, former Chairman of the National Labor Relations Board, traces the history of the Board and the courts in this area and finds that tension between the Board and the judiciary has resulted in a confused state of law. Moreover, the inability of the Board to fashion fair and effective remedies when violations have been found further exacerbates this confusion. Mrs. Murphy concludes that these matters must be resolved before progress can be made in solving existing problems as well as other potential problems, such as whether relocations to foreign countries should or should not be treated as mandatory subjects of collective bargaining.*

## I. INTRODUCTION

In its 1962 *Fibreboard* decision,<sup>1</sup> the National Labor Relations Board ruled that sections 8(a)(5)<sup>2</sup> and 8 (d)<sup>3</sup> of the National Labor Relations Act required an employer to bargain with a union over subcontracting bargaining unit work, even though the employer's decision to subcontract was motivated

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1. *Fibreboard Paper Prods. Corp.*, 138 N.L.R.B. 550 (1962), *aff'd*, 379 U.S. 203 (1964) [hereinafter referred to as *Fibreboard II*].

2. "It shall be an unfair labor practice for an employer . . . [t]o refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)." 29 U.S.C. § 158(a)(5) (1976).

3. For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . .

*Id.* § 158(d) (1976).

entirely by economic considerations. Despite affirmation by the U.S. Supreme Court seventeen years ago,<sup>4</sup> this area has yet to be clearly defined. The decision did, however, set the stage for unions to argue that an employer's decision to make economically-motivated operational changes other than subcontracting should also be the subject of mandatory bargaining.

Unions—and frequently the Board and the courts—have had to contend with numerous operational changes that result in the loss of bargaining unit jobs, including subcontracting, plant relocations, and plant closures. These operational changes are by no means recent phenomena. To the contrary, the ability and freedom of American employers to respond to technological changes has been one of the major strengths of the U.S. economy since the Industrial Revolution transformed this country from a largely agrarian society to a modern industrial state. Nevertheless, until World War II, operational changes undertaken by American employers generally did not include foreign investment, except as was necessary to supply natural resources. Beginning after World War II and accelerating during the 1950's and 1960's, investment in natural resources has been replaced by foreign investment in manufacturing industries. The primary vehicle for this direct investment has been the multinational corporation (MNC).<sup>5</sup>

The U.S. labor movement vigorously argues that direct foreign investment in the form of MNCs has caused the loss of jobs at home. To combat these job losses, labor has sought to impose restrictions on the growth of MNCs and limitations on the rise of imports. United States unions have not, however—as they have with job losses resulting from the transfer of work within the U.S.<sup>6</sup>—pushed to have an MNC's decision to relocate to a foreign country (and the effects thereof on U.S. workers) declared a mandatory subject of bargaining under the National Labor Relations Act.<sup>7</sup>

For whatever reason, perhaps because the issue has not been directly presented, the NLRB has not firmly required an MNC to bargain about the decision to transfer work from a bargaining unit in this country to a foreign location.<sup>8</sup> Although it has been argued that the Board has the authority to require bargaining over these decisions,<sup>9</sup> whether it chooses to exercise that authority is another matter.<sup>10</sup>

The purpose of this Article is to examine (1) the origin and development of the *Fibreboard* doctrine, particularly its application to plant relocations, (2)

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4. *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1964).

5. Hawkins, *Foreword to AMERICAN LABOR AND THE MULTINATIONAL CORPORATION* vii-xvii (D. Kojawa ed. 1973).

6. See notes 18-82 and accompanying text *infra*.

7. *Cf. Fibreboard Paper Prods. Corp.*, 139 N.L.R.B. 550 (1962), *aff'd*, 379 U.S. 203 (1964) (subcontracting bargaining unit work mandatory subject of bargaining).

8. *But see Production Molded Plastics, Inc.*, 227 N.L.R.B. 776 (1977), *enforced*, 604 F.2d 109 (6th Cir. 1979).

9. See *North Am. Soccer League*, 236 N.L.R.B. 1317 (1978).

10. See generally B. Murphy, *Multinational Corporations and Free Coordinated Transnational Bargaining: An Alternative to Protectionism?* 17 (August 1977) (speech at Manila World Law Conference, Manila, The Philippines).

judicial response to Board forays in this area, (3) the remedies devised by the Board in relocation cases,<sup>11</sup> and (4) the applicability, if any, of Board policy to decisions by MNCs to transfer bargaining unit work to foreign countries.

## II. THE ORIGIN AND DEVELOPMENT OF THE *FIBREBOARD* DOCTRINE

Section 8(5) of the original Wagner Act (now section 8(a)(5)) made it an unfair labor practice for an employer to refuse to bargain collectively with the representative of its employees.<sup>12</sup> The only allusion to the nature of this obligation is by reference to section 9(a) of the Act, which provides that the designated representative shall be the "exclusive representative" for collective-bargaining purposes with respect to "rates of pay, wages, hours of employment, or other conditions of employment."<sup>13</sup>

Both the statute and the legislative history are silent with respect to the NLRB's authority to specify compulsory subjects of bargaining. Soon after its creation, however, the Board began to define on a case-by-case basis those subjects within the phrase "wages, hours, and other terms and conditions of employment,"<sup>14</sup> in which bargaining is "mandatory," with both parties free to insist to impasse on their respective positions, and those subjects outside the employment relationship, in which bargaining is "permissive." The Supreme Court placed its imprimatur on the Board's general approach to this area in the famous *Borg-Warner* case.<sup>15</sup>

For the first twenty-seven years of the Act, until *Fibreboard II* in 1962, the Board usually (but not invariably) found a violation of section 8(a)(5) in operational changes only when anti-union motivation could be inferred.<sup>16</sup> While the Board did suggest that economically motivated changes may not be beyond the pale of section 8(a)(5), no clear theory emerged because the Board

11. This Article will focus primarily on plant relocations that are economically motivated. Because the remedies devised are virtually the same, however, and because it places this matter in an historical context, some attention will be directed toward so-called "runaway shops," *i.e.*, relocations that are undertaken because the employer seeks to penalize its employees for selecting a union or to avoid its bargaining obligation to the union.

12. Ch. 372, § 8(5), 49 Stat. 449 (1935) (current version at 29 U.S.C. § 158(a)(5) (1976)).

13. 29 U.S.C. § 159(a) (1976). *See also id.* § 158(d).

14. *Id.* § 158(d).

15. *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958).

16. In finding no violation in *Fibreboard Paper Prods. Corp.*, 130 N.L.R.B. 1558 (1961) [hereinafter referred to as *Fibreboard I*], the Board rejected the General Counsel's argument that an employer must bargain over economically-motivated operational decisions because it lacked supporting precedent and conflicted with existing case law. Board decisions on this point between 1945 and 1962, however, are confusing, if not inconsistent. *Compare Mahoning Mining Co.*, 61 N.L.R.B. 792, 803 (1945), in which the Board, in dictum, absolved an employer of an obligation to bargain about changing his business structure or selling or contracting out part of his operation, with *Timken Roller Bearing Co.*, 70 N.L.R.B. 500, 504 (1946), in which the Board affirmed a trial examiner's finding that the employer violated § 8(5) by "refusing to bargain regarding the subcontracting of work." *Id.* at 504. *See also Shamrock Dairy, Inc.*, 124 N.L.R.B. 494 (1959), in which the Board found a violation of § 8(a)(5) for the employer's failure to bargain with the union "as to whether the independent contractor system of distribution should be adopted." *Id.* at 497. For a comprehensive summary of pre-*Fibreboard* decisions, see Comment, *Employer's Duty to Bargain about Subcontracting and Other "Management Decisions,"* 64 COLUM. L. REV. 294, 301-03 (1964).

failed "to articulate unambiguously the distinction between the impact of a change and the decision to adopt it."<sup>17</sup>

#### A. Fibreboard and Town & Country

For the Board, at least, any ambiguity regarding an employer's obligation to bargain about the decision to make operational changes, as opposed to the effects of making such changes, disappeared between 1961 and 1962 when the Board decided *Fibreboard I*,<sup>18</sup> *Town & Country Manufacturing Co.*,<sup>19</sup> and *Fibreboard II*.<sup>20</sup>

In *Fibreboard I* the employer, concerned with increased maintenance costs, determined that substantial savings could be realized if its maintenance work was contracted out. The Trial Examiner, whose findings were adopted by the Board, concluded that the employer's motivation in contracting out this work was economic, not discriminatory. The Trial Examiner also concluded that the employer was under no obligation to discuss the decision to subcontract with the union. In his exceptions the General Counsel contended that the decision involved "conditions of employment" and, accordingly, subcontracting was a mandatory subject of bargaining.<sup>21</sup> The Board, however, rejected the General Counsel's arguments and limited bargaining to the effects of this change in operations.

A year later, in *Town and Country Manufacturing Co.*, the Board repudiated *Fibreboard I*. Rejecting the "management prerogative" argument that carried the day in *Fibreboard I*, the Board concluded that "the elimination of unit jobs, albeit for economic reasons, is a matter within the statutory phrase 'other terms and conditions of employment' and is a mandatory subject of collective bargaining within the meaning of Section 8(a)(5) of the Act."<sup>22</sup> In response to the dissent's contention that the Board's holding impinges on an employer's freedom "to make the decision," the majority observed:

This obligation to bargain in nowise restrains an employer from formulating or effectuating an economic decision to terminate a phase of his business operations. Nor does it obligate him to yield to a union's demand that a subcontract not be let, or that it be let on terms inconsistent with management's business judgment. Experience has shown, however, that candid discussion of mutual problems by labor and management frequently results in their resolution with attendant benefit to both sides. Business operations may profitably continue and jobs may be preserved. Such prior discussion with a duly designated bargaining representative is all that the Act contem-

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17. Comment, *supra* note 16, at 303.

18. 130 N.L.R.B. 1558 (1961).

19. 136 N.L.R.B. 1022 (1962).

20. 138 N.L.R.B. 550 (1962).

21. The General Counsel relied on *Shamrock Dairy, Inc.*, 124 N.L.R.B. 494 (1959). See note 16 *supra*.

22. 136 N.L.R.B. at 1027.

plates. But it commands no less.<sup>23</sup>

The Board, however, also found that the termination of the employees involved in *Town & Country* was discriminatorily motivated and violative of section 8(a)(3).<sup>24</sup> Therefore, the finding of a section 8(a)(5) violation was in the nature of dictum.

Five months later the Board reaffirmed its *Town & Country* position in reconsidering *Fibreboard* I, and the about face was complete. In overruling *Fibreboard* I the Board made clear that anti-union motivation was no longer the *sine qua non* for finding that changes in an employer's business operations—both the decision and its effects—required negotiation with the union.<sup>25</sup> The Board's order in *Fibreboard* II required the employer to reinstitute the maintenance operations previously performed by employees represented by the union, reinstate (with back pay) the employees terminated as a result of the employer's subcontracting, and fulfill its statutory duty to bargain with the union.

In 1964 the United States Supreme Court affirmed the Board's *Fibreboard* II<sup>26</sup> decision. In an opinion written by Chief Justice Warren the Court held that subcontracting "is well within the literal meaning of the phrase 'terms and conditions of employment,'"<sup>27</sup> and that the particular facts "illustrate the propriety of submitting the dispute to collective negotiation"<sup>28</sup>:

The Company's decision to contract out the maintenance work did not alter the Company's basic operation. The maintenance work still had to be performed in the plant. No capital investment was contemplated; the Company merely replaced existing employees with those of an independent contractor to do the same work under similar conditions of employment. Therefore, to require the employer to bargain about the matter would not significantly abridge his freedom to manage the business.<sup>29</sup>

Justice Stewart's concurring opinion, like the majority opinion, sought to limit *Fibreboard* to its facts. Thus, the majority observed that "[o]ur decision need not and does not encompass other forms of 'contracting' out or 'subcontracting' which arise daily in our complex economy."<sup>30</sup> Elaborating on this point, the concurring opinion, in which Justice Stewart was joined by Justices Douglas and Harlan, emphasized:

The Court most assuredly does not decide that every managerial de-

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23. *Id.*

24. *Id.* at 1026. Section 8(a)(3) provides: "It shall be an unfair labor practice for an employer . . . [b]y discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ." 29 U.S.C. § 158(a)(3) (1976).

25. The requirement to bargain about the effects, as opposed to the decision, of economically motivated operational changes has existed since the early years of the Wagner Act.

26. *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1964).

27. *Id.* at 210.

28. *Id.* at 213.

29. *Id.*

30. *Id.* at 215.

cision which necessarily terminates an individual's employment is subject to the duty to bargain. Nor does the Court decide that subcontracting decisions are as a general matter subject to that duty.<sup>31</sup>

. . . .  
[T]here are other areas where decisions by management may quite clearly imperil job security, or indeed terminate employment entirely. An enterprise may decide to invest in labor-saving machinery. Another may resolve to liquidate its assets and go out of business. Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core of entrepreneurial control. Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment. If . . . the purpose of § 8(d) is to describe a limited area subject to the duty of collective bargaining, those management decisions which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security should be excluded from the area.<sup>32</sup>

*B. The Duty To Bargain in Light of the Supreme Court's Darlington Decision*

Unlike *Fibreboard*, which involved section 8(a)(5) in the context of a well-established bargaining relationship, *Darlington*<sup>33</sup> arose under section 8(a)(3)<sup>34</sup> in the course of a union's drive to organize the employees at one of the employer's plants. Because of its section 8(a)(5) implications, however, the *Darlington* case warrants more than passing consideration.

In 1956 the Textile Workers commenced organizational activity among the Darlington mill employees. The employer responded in various ways, including alleged threats to close if the union was successful in an NLRB election. When the union won the election, Darlington closed the mill in November 1956 and sold all the plant's machinery and equipment a month later. The union countered by filing an unfair labor practice charge alleging violations of sections 8(a)(1), (3), and (5) of the National Labor Relations Act.

The Board found that Darlington was part of a single integrated enterprise, Deering Milliken, and that by closing a part of its operation in response to the union's victory in the election, Deering Milliken had violated sections 8(a)(1), (3), and (5).<sup>35</sup> The Fourth Circuit, however, assuming without deciding the Board's single-employer finding, held that an employer had an absolute right to close all or part of its business regardless of motivation.<sup>36</sup>

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31. *Id.* at 218 (Stewart, J., concurring).

32. *Id.* at 223 (Stewart, J., concurring).

33. *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263 (1963).

34. *See* note 24 *supra*.

35. *Darlington Mfg. Co.*, 139 N.L.R.B. 241 (1962), *enforcement denied*, 325 F.2d 682 (4th Cir. 1963).

36. *Darlington Mfg. Co. v. NLRB*, 325 F.2d 682 (4th Cir. 1963).

Before the Supreme Court the union—but not the Board<sup>37</sup>—contended that an employer who goes completely out of business to avoid unionization violates the Act. Rejecting the union's argument, the Court observed: "A proposition that a single businessman cannot choose to go out of business if he wants to would represent such a startling innovation that it should not be entertained without the clearest manifestation of legislative intent or unequivocal judicial precedent so construing the Labor Relations Act. We find neither."<sup>38</sup>

Although agreeing with the court of appeals that an independent employer's liquidation of its business is not an unfair labor practice, the Supreme Court rejected the court of appeal's view that the same result follows even if, as contended by the Board, "Darlington is regarded as an integral part of the Deering Milliken enterprise":

The closing of an entire business, even though discriminatory, ends the employer-employee relationship; the force of such a closing is entirely spent as to that business when termination of the enterprise takes place. On the other hand, a discriminatory partial closing may have repercussions on what remains of the business, affording employer leverage for discouraging the free exercise of § 7 rights among remaining employees of much the same kind as that found to exist in the "runaway shop"<sup>39</sup> and "temporary closing" cases. Moreover, a possible remedy open to the Board in such a case, like the remedies available in the 'runaway shop' and 'temporary closing' cases, is to order reinstatement of the discharged employees in the other parts of the business. No such remedy is available when an entire business has been terminated. By analogy to those cases involving a continuing enterprise we are constrained to hold, in disagreement with the Court of Appeals, that a partial closing is an unfair labor practice under § 8(a)(3) if motivated by a purpose to chill unionism in any of the remaining plants of the single employer and if the employer may reasonably have foreseen that such closing will likely have that effect.<sup>40</sup>

The Board had also found a section 8(a)(5) violation in *Darlington*. This finding, however, was based partially on the discriminatory closing of the mill. Therefore, *Darlington* did not squarely present to the Court the question whether section 8(a)(5) "requires an employer to bargain concerning a purely business decision to terminate his enterprise."<sup>41</sup>

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37. The Board's argument rested on the integrated nature of the operation, so that the closing of the Darlington mill represented a partial, rather than a complete, closing. See *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263, 265-70.

38. 380 U.S. at 270.

39. See note 11 *supra*.

40. 380 U.S. at 274-75 (footnote omitted). The Court remanded the case to the Board for further findings on "the purpose and effect of the closing with respect to the employees in the other plants comprising the Deering Milliken group." *Id.* at 276-77.

41. *Id.* at 267 n.5. Darlington maintained throughout that the plant was closed entirely for economic reasons. See, e.g., 139 N.L.R.B. at 245.

After all these years, the case was recently settled. See [1980] 1 LAB. REP. (BNA) (105 News & Backgrd. Info.) 320. By a vote of 472 to 8, the former Darlington workers accepted an offer of



### C. *Post-Fibreboard Developments*

Long before *Town & Country* and *Fibreboard* it was well settled that changes in business operations required bargaining about the *effects*, if not the *decision* to undertake the changes. With the Supreme Court's affirmation of *Fibreboard*, the *decision* to make the changes was no longer the exclusive prerogative of management. The *Fibreboard* rationale, however, contained a potential flaw. Both the majority and concurring opinions in *Fibreboard* sought to limit the decision to subcontracting and to the particular facts involved. Management and labor, nevertheless, viewed *Fibreboard* as having far-reaching implications. They both foresaw an expansion of the area about which an employer must bargain. Thus, notwithstanding the Board's assurances that *Fibreboard* did not obligate an employer to "yield to a union's demand" or arrive at a decision "inconsistent with management's business judgment," the overall response of employers to the *Fibreboard* decision was one of dismay.<sup>42</sup> On the other hand, unions, which had long wished for a greater voice in determining the destiny of their membership, looked at *Fibreboard* with "joyful expectations."<sup>43</sup>

An overview of the seventeen years since *Fibreboard* suggests that neither the fears of management nor the expectations of labor have come to pass. While decision-bargaining has been extended to a variety of business changes other than the subcontracting involved in *Fibreboard*, the Board has also exempted certain business decisions from the obligation to bargain. As a result of judicial reluctance to extend bargaining much beyond the subcontracting parameters of *Fibreboard*, combined with the Board's difficulty in fashioning fully effective remedies, the predictions (or expectations) of neither employers nor unions have come true.

After finally arriving at a decision it had been so long reluctant to make, the Board quickly dispelled any notion of a narrow interpretation of *Fibreboard*. From the contracting out in *Fibreboard*, decision-bargaining was extended in relatively short order to include a variety of operational decisions that, if implemented, would eliminate bargaining unit work. Employer decisions to automate portions of its operations,<sup>44</sup> to rely on independent contractors,<sup>45</sup> to sell a part of a business,<sup>46</sup> to lease a portion of the operations,<sup>47</sup> to relocate or consolidate,<sup>48</sup> and to terminate operations—both partially<sup>49</sup> and

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\$5 million in back pay. *Id.* The settlement had been proposed by the NLRB and agreed to by Milliken. *Id.*

42. Farmer, *Good Faith Bargaining Over Subcontracting*, 51 GEO. L.J. 558, 576 (1963).

43. Zeman, *The Aftermath of Fibreboard: The Cooling Off Period*, PROC. OF N.Y. U. NINETEENTH ANN. CONF. ON LAB. 413 (1967).

44. Richland, Inc., 180 N.L.R.B. 91 (1969); Northwestern Publishing Co., 144 N.L.R.B. 1069 (1963), *enforced*, 343 F.2d 521 (7th Cir. 1965); Renton News Record, Inc., 136 N.L.R.B. 1294 (1962).

45. Adams Dairy, Inc., 137 N.L.R.B. 815 (1962), *enforcement denied*, 350 F.2d 108 (8th Cir. 1965), *cert. denied*, 382 U.S. 1011 (1966).

46. Weingarten Food Center of Tenn., Inc., 140 N.L.R.B. 256 (1962).

47. Schnell Tool & Die Corp., 162 N.L.R.B. 1313 (1967).

48. Standard Handkerchief Co., 151 N.L.R.B. 15 (1965).

completely<sup>50</sup>—were brought under the *Fibreboard* umbrella.

### 1. Plant Relocation and Partial Closures

Although conceptually distinguishable, there is little practical difference between plant relocation and closure.<sup>51</sup> “From the point of view of the union, both result in termination of employment; from management’s point of view, both are operational changes.”<sup>52</sup> Since the Board and the courts have applied the principles of *Fibreboard* and *Darlington* to both employer actions (albeit with different results), the difference between relocation and partial closure may have little legal significance as well. In circumstances in which the same considerations are involved for analytical purposes, there is no apparent reason to view relocation and closure separately.<sup>53</sup>

Consistent with its expansive views of the obligation to bargain on operational changes in general, the Board has applied the principles of *Fibreboard* to plant relocations and closures. Unlike relocations, the Board has had to consider closure cases, whether partial or complete, in light of the *Darlington* decision.<sup>54</sup> In *Darlington* the Supreme Court, observed that “when an employer closes his entire business, even if the liquidation is motivated by vindictiveness toward the union, such action is not an unfair labor practice.”<sup>55</sup> Although *Darlington* involved a section 8(a)(3) violation and the section 8(a)(5) issue was not presented to the Court, the Supreme Court’s words have been interpreted by some lower courts as excluding both partial and total closings as outside the ambit of section 8(a)(5).<sup>56</sup>

The Board’s general rule is that *Darlington* is not applicable to section

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49. *Ozark Trailers, Inc.*, 161 N.L.R.B. 561 (1966); *Royal Plating & Polishing Co.*, 148 N.L.R.B. 545 (1964).

50. *Star Baby Co.*, 140 N.L.R.B. 678, 681 (1963), *enforced as modified*, 334 F.2d 601 (2d Cir. 1964).

51. Relocation usually implies a continued need for the work; closure normally means an employer is abandoning a portion of the business.

52. Schwarz, *Plant Relocation or Partial Termination—The Duty to Decision-Bargain*, 39 *FORDHAM L. REV.* 81, 87 n.36 (1970).

53. Both relocation and closure are terms of art that have no precise legal meaning. In relocation, essentially identical jobs are available at the new site and employees of the old facility are normally discharged. Relocation includes three distinct categories: (1) an employer abandons an existing plant and transfers the entire business to a new location, *see, e.g.*, *McLoughlin Mfg. Corp.*, 182 N.L.R.B. 958, 74 L.R.R.M. 1756 (1970), *enforced*, 463 F.2d 907 (D.C. Cir. 1972); (2) a particular operation is transferred to a new facility while continuing other operations at the old location, *see, e.g.*, *Tennessee-Carolina Transp., Inc.*, 108 N.L.R.B. 1369 (1954); (3) a multiplant employer simply transfers production contracts from one plant to another, *see, e.g.*, *Industrial Fabricating, Inc.*, 119 N.L.R.B. 162 (1957).

A partial or complete closure can also occur in these same contexts, with the primary distinction being that closure results in the jobs disappearing, while they still exist in relocation situations. Although indistinguishable in some respects, the difference between relocation and closure is important when it comes to fashioning remedies for violations. For a detailed discussion of relocation and closure, *see* SWIFT, *NLRB AND MANAGEMENT DECISION MAKING* 43-78 (1974).

54. *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263 (1965).

55. *Id.* at 273-74.

56. *See, e.g.*, *Morrison Cafeterias, Inc. v. NLRB*, 431 F.2d 254 (8th Cir. 1970), in which the Eighth Circuit held that it would find a § 8(a)(5) violation in partial or total closing situations only when the employer has also violated § 8(a)(3).

8(a)(5) situations. Thus, in the *Royal Plating* case<sup>57</sup> the Board stated:

We perceive nothing in that portion of the *Darlington* decision dealing with the discriminatory partial closing of a business which warrants withholding application of the Act's collective-bargaining provisions to Respondent's decision to close down the Bleeker Street plant.

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Plainly, Respondent's decision to close down . . . and the Union's efforts to bargain concerning that decision and its impact on employees related to employees' 'terms and conditions of employment.' . . . The fact that the decision was based on economic considerations made it particularly amenable to the procedures of collective bargaining. For under such procedures, the Respondent would not have surrendered its managerial right to run its business and to take those steps which its business judgment satisfied it were necessary. *All that was required here was that Respondent bargain in good faith about the termination of the Bleeker Street plant with its employees' bargaining representative* to give its employees an opportunity to persuade it to achieve similar economies through negotiation of an acceptable alternative.<sup>58</sup>

In *Ozark Trailers, Inc.*<sup>59</sup> the Board reiterated these views and also rejected the strict approach taken by several courts of appeal in applying *Fibreboard* to operational changes other than subcontracting. In *Ozark* the employer, without notifying or consulting with the union, closed a division of its operations that manufactured truck bodies. The Board found a violation in both the employer's failure to bargain about the decision as well as its effects. Commenting on the impact of *Darlington*, the Board stated:

We perceive nothing in that portion of the *Darlington* decision dealing with the discriminatory partial closing of a business which suggests the inapplicability of the collective-bargaining requirement of the Act to Respondents' decision to close down the Ozark plant. Indeed, as the *Darlington* decision affirms the propriety of the application of Section 8(a)(3) to a partial closing of a business, it would be anomalous to find that Section 8(a)(5) is without governing authority in such situations. We therefore find that the *Darlington* decision does not require dismissal of the complaints and that the question of whether the Respondents violated the Act in unilaterally determining to close down the Ozark plant must be decided in the light of considerations set forth in the Supreme Court's decision in the *Fibreboard* case.<sup>60</sup>

In response to the judiciary's restrictive interpretation of *Fibreboard*,<sup>61</sup>

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57. *Royal Plating and Polishing Co.*, 152 N.L.R.B. 619 (1965).

58. *Id.* at 622 (emphasis added).

59. 161 N.L.R.B. 561 (1966).

60. *Id.* at 565.

61. The narrow reading of *Fibreboard* by some reviewing courts is clearly gleaned from the *Fibreboard* majority's limitation of the decision to its facts and Justice Stewart's concurring opinion, which suggested that no bargaining is required when "entrepreneurial questions as what shall

the Board rejected the argument that the obligation to bargain turns on the financial significance or the importance of the operational change:

With all respect to the Court of Appeals for the Third and Eighth Circuit, we do not believe that the question whether a particular management decision must be bargained about should turn on whether the decision involves the commitment of investment capital, or on whether it may be characterized as involving 'major' or 'basic' change in the nature of the employer's business. True it is that decisions of this nature are, by definition, of significance for the employer. It is equally true, however, and ought not be lost sight of, that an employer's decision to make a 'major' change in the nature of his business, such as the termination of a portion thereof, is also of significance for those employees whose jobs will be lost by the termination. For, just as the employer has invested capital in the business, so the employee has invested years of his working life, accumulating seniority, accruing pension rights, and developing skills that may or may not be salable to another employer. And, just as the employer's interest in the protection of his capital investment is entitled to consideration in our interpretation of the Act, so too is the employee's interest in the protection of his livelihood.

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In short, we see no reason why employees should be denied the right to bargain about a decision directly affecting terms and conditions of employment which is of profound significance for them solely because that decision is also a significant one for management.<sup>62</sup>

In the Board's view, a decision to terminate a portion of an operation, "just as contracting out, is a problem of vital concern to both labor and management, and it would promote the fundamental purpose of the [National Labor Relations] Act to bring that problem within the collective-bargaining framework set out in the Act."<sup>63</sup>

What the Board had to say about the application of *Fibreboard* to partial closures is equally relevant to plant relocations,<sup>64</sup> as the Board quickly made clear after *Fibreboard* II was decided in 1962.<sup>65</sup> Thus, the *Fibreboard* principles were applied to a can manufacturing company's decision to "move the 2

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be produced, how capital shall be invested in fixed assets, or what the basic scope of the enterprise shall be" are involved. 379 U.S. at 225 (Stewart, J., concurring).

62. 161 N.L.R.B. at 566-67.

63. *Id.* at 567.

64. Although the emphasis on *Fibreboard* suggests that decision-bargaining in relocation situations began with this landmark case, *Fibreboard* was really the culmination of a dispute going back to 1941. See *Gerity Whitaker Co.*, 33 N.L.R.B. 393 (1941), *enforced as modified per curiam*, 137 F.2d 198 (6th Cir. 1942) (failure to bargain about decision to relocate violative of § 8(5)). See also *California Portland Cement Co.*, 101 N.L.R.B. 1436 (1952). Compare, however, *Brown Truck & Trailer Mfg. Co.*, 106 N.L.R.B. 999 (1953), in which the Board seemed to limit relocation bargaining to the effects of the decision. For a detailed discussion of pre-*Fibreboard* decisions on this point, see *Duty to Bargain: Subcontracting, Relocation, and Partial Termination*, 55 GEO. L.J. 879, 901-07 (1967).

65. See *International Shoe Co.*, 151 N.L.R.B. 693 (1965); *Shell Oil Co.*, 149 N.L.R.B. 305 (1964); *R.C. Can Co.*, 144 N.L.R.B. 210 (1963).

½" line from Arlington to Denison, Texas,<sup>66</sup> the relocation of a handkerchief manufacturing company from New York City to Amsterdam, New York,<sup>67</sup> a freight agent's closing of its Los Angeles terminal and reopening in Long Beach,<sup>68</sup> an employer's closing of its plant in New York and the removal of its operations to Florida,<sup>69</sup> and various other relocations.<sup>70</sup>

*Ozark Trailers* leaves little room for doubt that *Fibreboard*, at least in the Board's view, is equally applicable to partial closings and relocations and that, again, as far as the Board is concerned, the obligation to bargain is not affected by a "basic" change in a business or a management decision to reconvert or reinvest funds. Five years later, however, the Board's decision in *General Motors Corp.*<sup>71</sup> led some observers to conclude that *Ozark Trailers* had been overruled.<sup>72</sup>

*General Motors* involved an economically based decision to dispose of an independent dealership. Rejecting a Trial Examiner's conclusion that the transaction was similar to subcontracting, and therefore governed by the principles of *Fibreboard*, a sharply divided Board concluded that the transaction "was in essence a sale."<sup>73</sup> Without any reference to *Ozark Trailers* the majority held:

[T]his issue is controlled by the rationale the courts have generally adopted in closely related cases, that decisions such as this, in which a significant investment or withdrawal of capital will affect the scope and ultimate direction of an enterprise, are matters essentially financial and managerial in nature. They thus lie at the very core of entrepreneurial control and are not the types of subjects which Congress intended to encompass within 'rates of pay, wages, hours or employment, or other conditions of employment.' Such managerial decisions oftentimes require secrecy as well as the freedom to act quickly and decisively. They also involve subject areas as to which the determinative financial and operational considerations are likely to be unfamiliar to the employees and their representatives.<sup>74</sup>

*Summit Tooling Co.*<sup>75</sup> seemed to signal a further retreat from the expansive principles of *Ozark Trailers*. Although recognizing that the case might be

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66. R.C. Can Co., 144 N.L.R.B. 210 (1963).

67. Standard Handkerchief Co., 151 N.L.R.B. 15 (1965).

68. Transmarine Navigation Corp., 152 N.L.R.B. 998 (1968).

69. Garwin Corp., 153 N.L.R.B. 664 (1965), *enforced as modified*, 374 F.2d 295 (D.C. Cir.) *cert. denied*, 387 U.S. 942 (1967).

70. See P.B. Mutrie Motor Transp., 226 N.L.R.B. 1325 (1976); American Needle & Novelty Co., 206 N.L.R.B. 534 (1973); Royal Norton Mfg. Co., 189 N.L.R.B. 489 (1971).

71. 191 N.L.R.B. 951 (1971).

72. See, e.g., Rabin, *The Decline and Fall of Fibreboard*, N.Y. U. CONF. ON LAB. See also the Third Circuit's discussion of this point in *Brockway Motor Trucks, Inc. v. NLRB*, 582 F.2d 720, 724-30 n.66 (3d Cir. 1978).

73. 191 N.L.R.B. at 951.

74. *Id.* at 952. The dissenting members of the Board contended that the majority had adopted Justice Stewart's concurring opinion in *Fibreboard* and the decisions of several courts of appeal that had denied enforcement of Board decisions applying *Fibreboard*. They would have relied on *Ozark Trailers* to find a violation.

75. 195 N.L.R.B. 479 (1972).

viewed as a partial plant closing, the Board held that "its practical effect was to take the Respondent out of the business of manufacturing tool and tooling products."<sup>76</sup> Citing *Darlington*,<sup>77</sup> the practical effects of respondent's closing "was to eliminate itself as an employer."<sup>78</sup> Concluding that a requirement to bargain about a decision to close out its manufacturing operation would "significantly abridge Respondent's freedom to manage its own affairs," the majority found no violation in the employer's unilateral decision to close its manufacturing operations.<sup>79</sup>

In *Royal Typewriter Co.*,<sup>80</sup> however, another partial closing case, the Board distinguished *General Motors* on the basis that *General Motors* involved "an economic decision to sell,"<sup>81</sup> and without reconciling the possible conflicting approaches, simply stated that *General Motors* did not overrule *Ozark Trailers*.<sup>82</sup>

## 2. Summary of Post-Fibreboard Developments

Until *Fibreboard II* in 1962 the NLRB had generally held that an employer had no obligation under section 8(a)(5) to bargain with a union about the decision to make economically motivated changes in the operation of its business. Only when the operational changes were (1) discriminatorily motivated under section 8(a)(3) or (2) part of an unlawful scheme to avoid dealing with the union did the Board find a violation of section 8(a)(5). In theory, at least, *Fibreboard* significantly expanded the bargaining obligation, and the rationale of *Fibreboard* was steadily extended from the subcontracting involved in that case to a variety of other operational changes that heretofore had been the exclusive prerogative of management. Regardless of whether *General Motors* represents a Board retreat in this area, the impact of *Fibreboard* has been effectively muted by the courts.

## III. JUDICIAL RESPONSE TO FIBREBOARD

At the risk of oversimplification, the response of the judiciary to *Fibreboard* can be summed up in a single word: unfriendly. The courts generally, but not uniformly, have rejected Board attempts to extend decision-

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76. *Id.* at 480.

77. Since the Board also found that the employer's action was discriminatorily motivated, *Summit Tooling* did not pose the issue left open by *Darlington*, i.e., whether an employer who chooses to go out of business *entirely* for economic reasons might be liable for an unfair labor practice under § 8(a)(5). In the only total shutdown case the Board, in dictum, held that the decision to go out of business entirely "is completely within the prerogative of the Employer." See *Merryweather Optical Co.*, 240 N.L.R.B. No. 169 (March 6, 1979); note 96, *infra*. See also *Electrical Prods. Div. of Midland-Ross Corp.*, 239 N.L.R.B. 323 (1978); *Stagg Zipper Corp.*, 222 N.L.R.B. 1249 (1976).

78. 195 N.L.R.B. at 480.

79. *Id.* at 480. As in *General Motors*, the dissent argued that this case was controlled by *Ozark Trailers*.

80. 209 N.L.R.B. 1006 (1974).

81. *Id.* at 1012 (emphasis omitted).

82. *Id.* See also *Brockway Motor Trucks, Inc. v. NLRB*, 582 F.2d 720, 729 n.66 (3d Cir. 1978); note 96 *infra*.

bargaining to operational changes other than to factual situations similar to the subcontracting involved in *Fibreboard*. Thus, at least five circuits—the third,<sup>83</sup> sixth,<sup>84</sup> eighth,<sup>85</sup> ninth,<sup>86</sup> and tenth<sup>87</sup>—have rejected the Board's application of *Fibreboard* to nonsubcontracting changes, particularly partial closings. Of the other courts that have spoken definitively on this subject, only the Fifth Circuit,<sup>88</sup> and possibly the D.C. Circuit<sup>89</sup> and the Second Circuit,<sup>90</sup> have been receptive to the Board's post-*Fibreboard* decisions.

The disagreement between the Board and the courts in this area reflects the courts' adoption of limiting language in *Fibreboard*, particularly the concurring opinion of Justice Stewart with its exclusion from the bargaining obligation of decisions involving "the commitment of investment capital" or "the basic direction of a corporate enterprise."<sup>91</sup> The Board responded to the judiciary's rebuff in *Ozark Trailers*,<sup>92</sup> setting forth its views on the application of *Fibreboard* to partial terminations. Rejecting the idea that the obligation to bargain does not arise when a "major" or "basic" change or the "commitment

83. *NLRB v. Royal Plating & Polishing Co.*, 350 F.2d 191 (3d Cir. 1965) (No obligation to bargain about decision to close one of two plants when, prior to determination to close, employer had suffered "severe" economic losses for several years and property on which closed plant was located had been designated to be "redeveloped," so that there was "no room for negotiation.") *But see* *Brockway Motor Trucks, Inc. v. NLRB*, 582 F.2d 720, 734-39 (3d Cir. 1978) (clarifying *Royal Plating* in propounding "an initial presumption . . . that a partial closing is a mandatory subject of bargaining" and in fashioning a balancing analysis weighing employer and employee interests in bargaining to determine whether the presumption has in fact been rebutted). *See generally*, Comment, *Duty to Bargain About Termination of Operations*, *Brockway Motor Trucks v. NLRB*, 92 HARV. L. REV. 768 (1979).

84. *NLRB v. Acme Indus. Prods.*, 439 F.2d 40, 42 (6th Cir. 1971) (In finding no obligation to bargain over the decision to move work of one unit to another unit, the court held that the "broad implications of *Fibreboard* which the Board attempts to impose . . . are ill founded." *Cf. Weltronic Co. v. NLRB*, 419 F.2d 1120 (6th Cir. 1969), *cert. denied*, 398 U.S. 938 (1970) (Because the transfer of a job to a new plant three miles away has a significant impact on terms of employment, the transferring company has a statutory duty to give the union an opportunity to bargain.).

85. *NLRB v. Adams Dairy, Inc.*, 350 F.2d 108 (8th Cir. 1965), *cert. denied*, 382 U.S. 1011 (1966) (Termination of milk distribution system constituted a "basic operational change" after which, unlike *Fibreboard*, employer retained no control over independent contractor's performance of milk distribution; negotiations had occurred before contract came into effect.).

86. *NLRB v. Transmarine Navigation Corp.*, 380 F.2d 933, 939 (9th Cir. 1967) (Move of shipbuilding facilities to new location not a mandatory subject of bargaining when evidence indicated that employer was in danger "of becoming unable to serve adequately its principal customer:").

87. *NLRB v. Thompson Transp. Co.*, 406 F.2d 698, 703 (10th Cir. 1969) (No obligation to bargain over closing of a terminal when evidence indicated that employer had lost the "major part" of its business and relocation involved a major commitment of capital and a fundamental alteration of the corporate enterprise.)

88. *See NLRB v. Winn-Dixie Stores, Inc.*, 361 F.2d 512 (5th Cir.), *cert. denied*, 385 U.S. 935 (1966) (decision to discontinue cheese cutting and packing at the employer's warehouse held to be a mandatory subject of bargaining). *See also NLRB v. W.R. Grace & Co.*, 571 F.2d 279 (5th Cir. 1978) (employer must bargain over decision to discontinue part of the production process); *NLRB v. American Mfg. Co.*, 351 F.2d 74 (5th Cir. 1965) (duty to bargain before subcontracting work previously done by motor truck transportation department).

89. *Garment Workers v. NLRB*, 463 F.2d 907 (D.C. Cir. 1972).

90. *NLRB v. First Nat'l Maintenance Corp.*, 627 F.2d 596, 601-02 (2d Cir. 1980), *cert. granted*, 49 U.S.L.W. 3480 (U.S. Jan. 13, 1981) (No. 80-544) (Establishing "rebuttal presumption" of duty to bargain in partial closing context that employer's can overcome "by showing that the purposes of the statute would not be furthered by imposition of a duty to bargain").

91. 379 U.S. at 223 (Stewart, J., concurring).

92. *Ozark Trailers, Inc.*, 161 N.L.R.B. 561 (1966).

of investment capital" is involved, the Board held that *Fibreboard* is equally applicable to partial closings and than an employer must discuss the decision to close as well as its impact.<sup>93</sup> The Eighth Circuit was unimpressed. It has repeatedly refused to adopt the Board's views, holding instead that "[a]bsent union animus, a company has no legal duty to bargain with a union over the decision to partially shut down its operations because of economic reasons."<sup>94</sup> In essence, except for *General Motors*,<sup>95</sup> which the Board has sought to limit,<sup>96</sup> the Board has adopted a pro-bargaining stance, emphasizing that such decisions fall within the ambit of the "terms and conditions of employment." The judiciary, however, fastening on the limiting language of Justice Stewart's concurring opinion, usually, but not invariably, has come down on the side of management.

The Supreme Court may soon resolve this dispute between the Board and the courts. The Court recently agreed to review a decision of the Second Circuit in which the court of appeals split the difference between the Board and the courts. Following the lead of the Third Circuit,<sup>97</sup> the court in *NLRB v. First National Maintenance Corp.*<sup>98</sup> held that there is a rebuttable presumption under section 8(a)(5) of the NLRA that an employer is under a duty to bargain about a partial closing of its operations.<sup>99</sup> Rejecting, however, what it characterized as the Third Circuit's "balancing of the respective interests of the employer and employees in bargaining"<sup>100</sup> as the "determinative factor" in assessing whether the presumption has in fact been rebutted, the Second Circuit concluded that the appropriate analysis should center around a "showing

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93. *Id.* at 566.

94. *Royal Typewriter Co. v. NLRB*, 533 F.2d 1030, 1039 (8th Cir. 1976); see also *Morrison Cafeterias Consol., Inc. v. NLRB*, 431 F.2d 254 (8th Cir. 1970); *NLRB v. Drapery Mfg. Co.*, 425 F.2d 1026 (8th Cir. 1970). The Board has had better success persuading the courts to apply *Fibreboard* to plant relocations rather than to partial closings. See, e.g., *NLRB v. Plymouth Indus., Inc.*, 435 F.2d 558 (6th Cir. 1970) (per curiam), in which the Sixth Circuit required decision-bargaining over the transfer of work from a plant in Warren, Michigan, to a facility in Ithaca, Michigan; *Weltronic Co. v. NLRB*, 419 F.2d 1120 (6th Cir.), cert. denied, 398 U.S. 938 (1969), in which the same court enforced the Board's order requiring bargaining about the employer's decision to relocate from Peru, Indiana, to Uniontown, Alabama. Compare, however, *NLRB v. Acme Indus. Prods., Inc.*, 439 F.2d 40, 43 (6th Cir. 1971), in which the Sixth Circuit held that the employer "had no obligation to negotiate with regard to its decision to move the standard production unit to another plant."

95. *General Motors Corp.*, 191 N.L.R.B. 951 (1971).

96. Subsequent Board decisions have distinguished *General Motors*, so that *General Motors* may be a case without a doctrine. See, e.g., *International Harvester Co.*, 236 N.L.R.B. 712 (1978); *Royal Typewriter Co.*, 209 N.L.R.B. 1006 (1974). The only case in which it might be argued that *General Motors* was followed is *Merryweather Optical Co.*, 240 N.L.R.B. No. 169 (March 6, 1979). In that case, however, the failure to discuss the decision to close completely was not alleged as a violation, and the Board, in dictum, cited *General Motors* as authority for the general proposition that a decision to close that involves "significant investment or withdrawal of capital" that "affect[s] the scope and ultimate direction of the enterprise" is completely within the prerogative of the employer. *Id.* at 6.

97. See *Brockway Motor Trucks, Inc. v. NLRB*, 582 F.2d 720, 734-39 (3d Cir. 1978); note 83 *supra*.

98. 627 F.2d 596 (2d Cir. 1980), cert. granted, 49 U.S.L.W. 3480 (U.S. Jan. 13, 1981) (No. 80-544).

99. *Id.* at 601-02.

100. *Id.* at 601.



that the purposes of the statute would not be furthered by the imposition of a duty to bargain."<sup>101</sup> In dissent, Judge Kearsce adhered to the generally prevailing view in the circuit courts<sup>102</sup> and argued that the decision to close a financially-troubled operation is "a matter of fundamental entrepreneurial discretion" about which an employer is not required to bargain under *Fibreboard* and its progeny.<sup>103</sup> If the Court follows the lead of Judge Kearsce's dissent and renders an unequivocal ruling that an employer need not bargain about a partial closing under any circumstances, the tenor of labor-management relations in many contexts will be fundamentally altered.

#### IV. *FIBREBOARD* REMEDIES

If court resistance has been a problem, the inability to fashion fully effective remedies has further inhibited the development of *Fibreboard*. Fashioning effective remedies, however, transcends *Fibreboard*-type cases. Therefore, this problem should be examined in light of the Board's overall experience in this area.

Section 10(c) of the National Labor Relations Act<sup>104</sup> has been construed as vesting the Board with broad discretion to remedy unfair labor practices. This discretion, however, is not unfettered. The major limitation placed on the Board's discretion is that the *remedies devised by the Board must be remedial, not punitive*.<sup>105</sup> The remedial/punitive dichotomy arose during the early years of the Act's enforcement, culminating with the Supreme Court's decision in the *Republic Steel* case.<sup>106</sup> In articulating the distinction, the Court said that the language in section 10(c):

should be construed in harmony with the spirit and remedial purposes of the Act. We do not think that Congress intended to vest in

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101. *Id.* The distinction between the two circuit courts may be more semantic than real. For example, the Third Circuit in *Brockway Motor Trucks* pointed out that one factor that would demonstrate the utility of bargaining is "the frequency with which parties to labor-management contracts include clauses in their agreements bearing on such a matter." 582 F.2d at 737. The Second Circuit in *First Nat'l Maintenance Corp.* noted as well that "the custom of the industry" to bargain about a partial closing would be a salient factor in its analysis. 627 F.2d at 601-02. And, in suggesting that an employer need not bargain "when it is clear that the employer's decision cannot be changed," *id.* at 601, the Second Circuit in essence is using a variant of the Third Circuit's analysis that "weigh[s] the competing interests of the employer against those of the employees." 582 F.2d at 733. More specifically, in such a setting, the employer's right to control the destiny of his business outweighs the interests of the employees in altering "the prospect of losing their jobs." *Id.* at 735. In short, the similarity of the two courts in rejecting a per se rule to resolve the partial closing problem and in establishing a multi-faceted approach that analyzes all the facts and circumstances and that places the burden on the employer to explain a refusal to bargain is far more significant than the differences between the two decisions.

102. See notes 83-87 *supra*.

103. 627 F.2d at 605 (Kearsce, J., dissenting).

104. Upon a finding that an employer or union is engaging in an unfair labor practice, § 10(c) authorizes the Board to issue a "cease and desist order" and to "take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of the Act . . . ." 29 U.S.C. § 160(c) (1976).

105. The Act contains no express penalties for violating its provisions, and only when a respondent employer or union is held to be in contempt (a finding made by a court, not the Board) is there any possibility of fines or incarceration.

106. *Republic Steel Corp. v. NLRB*, 311 U.S. 7 (1940).

the Board a virtually unlimited discretion to devise punitive measures, and thus to prescribe penalties or fines which the Board may think would effectuate the policies of the Act.<sup>107</sup>

Thus, whenever possible the Board's remedial efforts are designed to restore the status quo—to return employees to the position that existed before the rights were violated. As long as the relief ordered is intended to "make someone whole who has been deprived of a recognized interest by acts that constitute a violation of the Act and/or . . . to prevent the violator from benefiting by his misdeed," the Board's order should stand.<sup>108</sup>

The Board's customary remedy for employees discharged in violation of section 8(a)(3) calls for an offer of reinstatement and back pay for wages lost as a result of discrimination.<sup>109</sup> In the typical section 8(a)(3) case the employer is still in business and the job from which the employee was discharged is still being performed. Therefore, the Board's order requiring an offer of reinstatement and back pay imposes no undue burden upon the employer. Under these circumstances the reinstatement and back pay remedy has been uniformly approved by reviewing courts.<sup>110</sup>

A different situation is presented, however, when for one reason or another the employer has moved or permanently abolished the operations formerly performed by the unlawfully discharged employees. The classic case of this type is the so-called "runaway shop," in which an employer closes down one facility and moves to another location in order to avoid its obligations toward a union or to penalize the employees for having selected a union.<sup>111</sup> Even when the unlawful relocation is near the original facility, the Board's normal remedy is limited to an offer of reinstatement, back pay, and moving expenses. The Board generally has not ordered an employer to resume operations at the old location if that facility was completely closed.<sup>112</sup> To remedy the section 8(a)(5) violation in runaway shop situations, the Board customarily gives an employer the option of returning to the original location, in which case the payment of moving expenses to employees who accept offers of reinstatement is obviated. This remedy is applied only when the new plant is lo-

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107. *Id.* at 11.

108. *NLRB v. Coats & Clark, Inc.*, 241 F.2d 556, 561 (5th Cir. 1957).

109. *See, e.g., Sure-Tan, Inc.*, 234 N.L.R.B. 1187, 1187 (1978); *Cabana Motel*, 222 N.L.R.B. 394, 395 (1976); *F.W. Woolworth Co.*, 90 N.L.R.B. 289, 291-94 (1950).

110. *See, e.g., Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 175-77 (1973); *NLRB v. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262-66 (1969); *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 380-81 (1967); *NLRB v. Dayton Tire & Rubber Co.*, 591 F.2d 566, 570-73 (10th Cir. 1979); *NLRB v. Interurban Gas Co.*, 354 F.2d 76, 77-78 (6th Cir. 1965).

111. *See, e.g., Garwin Corp.*, 153 N.L.R.B. 664 (1965), *enforced as modified*, 374 F.2d 295 (D.C. Cir. 1967), *cert. denied*, 395 U.S. 980 (1969); *Sidele Fashions, Inc.*, 133 N.L.R.B. 547 (1961), *enforced per curiam*, 305 F.2d 825 (3d Cir. 1962).

112. *Cf. Tennessee-Carolina Transp., Inc.*, 108 N.L.R.B. 1369, 1374-77 (1954) (Member Murdock dissenting) (failure to require presumption of terminal operations allows unfair labor practices to remain unremedied). Compare, however, *Gibraltar Indus., Inc.*, 237 N.L.R.B. 798, 819 (1978), in which the Board adopted an administrative law judge's remedy ordering the employer to return operations from Brooklyn, New York, to the closed plant in Kentucky because restoration would be "relatively simple" since the employer still had a lease on the old facility.

cated some distance from the old location.<sup>113</sup> When the new facility is near the old one, the Board assumes that a majority of the employees would have transferred had they been afforded an opportunity, and orders bargaining.<sup>114</sup>

As might be expected, those employers whose primary motivation in relocating is to admittedly avoid bargaining more often than not opt not to return to the old location, especially since experience shows that few employees are likely to accept an offer of reinstatement to transfer to the new facility. The Board has attempted to remedy this by ordering the runaway employer to recognize and bargain with the union irrespective of the union's majority status. The courts, however, have denied enforcement,<sup>115</sup> finding that the Board's remedy seeks "to 'punish' the Employer by means which invade guaranteed rights of [the new] workers and fail . . . to accord freedom of choice its proper place."<sup>116</sup>

The Board's efforts to remedy runaway shop situations—by and large unsuccessful—provide an illuminating and perhaps prophetic backdrop against which to view Board attempts to fashion effective remedies for *Fibreboard* and its progeny. For if the Board has been unable to devise remedies that would pass court muster when the loss of jobs results from *discriminatorily* motivated acts under section 8(a)(3), prospects of favorable response from the courts when the job losses result from *economically* motivated operational changes are predictably dim.<sup>117</sup>

The touchstone for remedies in *Fibreboard* situations, as it is for all unfair labor practice cases, is the restoration of the status quo.<sup>118</sup> This principle is not mechanically applied, however, and may be tempered if complete restoration would impose an unfair or undue burden on the employer or if such remedy would endanger the employer's viability.<sup>119</sup> As this has been a consideration when the adverse impact on employees is discriminatorily motivated, it is a fortiori an obvious factor when the loss of unit jobs results from operational changes motivated by purely *economic* reasons.<sup>120</sup>

113. *See Sidele Fashions, Inc.*, 133 N.L.R.B. 547, 555-56 (1961), *enforced per curiam*, 305 F.2d 825 (3d Cir. 1962).

114. *Hurley Co.*, 136 N.L.R.B. 551, *enforced*, 310 F.2d 158 (8th Cir. 1962); *Royal Optical Mfg. Co.*, 135 N.L.R.B. 64 (1962); *Royal Oak Tool & Mach. Co.*, 132 N.L.R.B. 1361 (1961), *enforced*, 320 F.2d 77 (6th Cir. 1967); *California Footwear Co.*, 114 N.L.R.B. 765 (1955).

115. *Cooper Thermometer Co. v. NLRB*, 376 F.2d 684 (2d Cir. 1967); *Local 57, Int'l Ladies Garment Workers v. NLRB*, 374 F.2d 295 (D.C. Cir.), *cert. denied*, 387 U.S. 942 (1967). For a perceptive discussion of the problem of remedies in runaway shop situations, see Kramer, *NLRB Remedies for the Runaway Shop: Loopholes in the National Labor Policy*, 1967 U. ILL. L.F. 649.

116. *Local 57, International Ladies' Garment Workers' Union v. NLRB*, 374 F.2d 295, 302, *cert. denied*, 387 U.S. 942 (1967).

117. Perhaps further casting a shadow over Board efforts to provide effective remedies for unfair labor practices is *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970), in which the Supreme Court held that notwithstanding the employer's bad faith bargaining, the Board lacked the power to compel an employer to grant the union a dues checkoff clause when the employer had refused to agree to such a clause in the course of bargaining.

118. *Fibreboard Paper Prods. Corp.*, 138 N.L.R.B. 550, 555 (1962) (*Fibreboard II*).

119. The difficulty and impracticality of requiring an employer to resume operations has been recognized by the Board in runaway shop situations. *See Garwin Corp.*, 153 N.L.R.B. 664 (1965), *enforced as modified*, 374 F.2d 295 (D.C. Cir. 1967).

120. *R & H Masonry Supply, Inc.*, 238 N.L.R.B. No. 149 (Sept. 29, 1978); *Renton News Rec-*

This is particularly true for economically motivated operational changes consisting of partial closures and relocations. Viewed against the above background, examination of remedies devised by the Board in post-*Fibreboard* decisions discloses that the relief ordered has paralleled remedial action in section 8(a)(3) cases, but tailored to reflect that these cases involve the obligations to bargain under section 8(a)(5) of the Act.

In *Fibreboard* the Board sought restoration of the status quo by ordering the employer to abrogate the subcontract and reinstate the terminated employees with back pay. The Board, noting that the maintenance operation was still being performed essentially as it was before the subcontracting, that the employer continued to need the service, and that the subcontract was terminable at will upon sixty days' notice, concluded that restoration would not impose "an undue and unfair burden" on the employer. Neither the D.C. Circuit nor the Supreme Court had any problems with the Board's remedy, notwithstanding the employer's contention that reinstatement was improper because under section 10(c) the Board's authority is limited to reinstating employees who have been *unlawfully* discharged.

In factual situations similar to *Fibreboard*, namely those in which (1) the impact on the bargaining unit results from subcontracting, (2) the employer still needs the work in question, and (3) no undue hardship would be imposed, the Board has ordered termination of the subcontract and resumption of operations.<sup>121</sup> However, for other operational changes, including relocations and partial closings, the Board, with reason, has been reluctant to order the resumption of operations. Indeed, although contending that it has the power to do so, the Board has rarely ordered an employer to return a plant to its original location, even when the relocation of the plant was discriminatorily motivated under section 8(a)(3).

Notwithstanding its theoretical arsenal of weapons, the Board—responding perhaps to the judiciary's refusal to enforce its decisions—has recognized that in many instances it simply is impracticable, if not impossible, to restore completely the status quo.<sup>122</sup> Nevertheless, the Board has recognized that something more than a simple order to bargain is necessary if bargaining is to be more than an "exercise in futility." Since the union in these situations has been presented with a *fait accompli*, the Board has developed what has come to be known as the *Van's Packing* formula.<sup>123</sup>

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ord, 136 N.L.R.B. 1294 (1962). Cf. *Great Chinese Am. Sewing Co.*, 227 N.L.R.B. 1670 (1977) (when reopening unprofitable plant would be unduly burdensome, employer must pay employees who were discriminatorily terminated for loss of pay from termination until another job is secured.).

121. *Equitable Gas Co.*, 245 N.L.R.B. No. 38 (Sept. 24, 1979); *AMCAR Div.*, *ACF Indus.*, 231 N.L.R.B. 83 (1977).

122. In a case that involved § 8(a)(3) violations as well as the failure to bargain over the decision and effects of the transfer of work to another state shortly after the union won an election, the Board ordered resumption of the operation at the closed plant. Resumption was "relatively simple," however, because the old facility was still leased by the employer. *Gibraltar Indus. Inc.*, 237 N.L.R.B. 798, 819 (1978).

123. *Van's Packing Plant*, 211 N.L.R.B. 692 (1974). This remedy was first formulated in 1968. See *Transmarine Navigation Corp.*, 170 N.L.R.B. 389 (1968).

The underlying rationale of the *Van's Packing* formula is that the affected employees have been denied the services of their union when the employer still needs the services of the employees, so that a "measure of balanced bargaining power exist[s]." Recognizing that complete restoration of the status quo is not possible, the Board seeks to restore "some measure of economic strength to the union" by accompanying the bargaining order with a "limited backpay requirement." The back pay requirement has a two-fold purpose: (1) to make the displaced employees whole for losses resulting from the unfair labor practice; and (2) to "recreate in some practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences" as far as the employer is concerned. For example, the formula devised in *Van's Packing* provided for back pay from five days after the Board's decision until the occurrence of the earliest of the following conditions:

(1) the date the Respondent bargains to agreement with the Union on those subjects pertaining to the effects of the plant shutdown on its employees; (2) a bona fide impasse in bargaining; (3) the failure of the Union to request bargaining within 5 days of this Decision, or commence negotiations within 5 days of the Respondent's notice of its desire to bargain with the Union; or (4) the subsequent failure of the Union to bargain in good faith; but in no event shall the sum paid to any of these employees exceed the amount he would have earned as wages from March 23, 1973, the date on which the Respondent terminated its wholesale slaughtering operations, to the time he secured equivalent employment elsewhere, or the date on which the Respondent shall have offered to bargain, whichever occurs sooner; provided, however, that in no event shall this sum be less than these employees would have earned for a 2-week period at the rate of their normal wages when last in the Respondent's employ.<sup>124</sup>

The Board is also making greater use of its authority to seek injunctive relief under section 10(j) of the Act.<sup>125</sup> While remedies under section 10(c) are designed to *restore* the status quo, section 10(j) injunctive relief seeks to *maintain* the status quo so that "the Board's final order, when entered, will not be a nullity."<sup>126</sup> Such relief also assures "that the remedial purposes of the Act will not be furthered by the delays inherent in the statutory framework for litigation."<sup>127</sup> Over the past few years the Board has resorted more frequently to section 10(j), both generally and with respect to *Fibreboard*-type operational changes.<sup>128</sup>

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124. 211 N.L.R.B. at 692.

125. Section 10(j) of the National Labor Relations Act authorizes the Board, "upon issuance of a complaint . . . charging that any person has engaged in or is engaging in an unfair labor practice, to petition any District Court of the United States . . . for appropriate temporary relief or restraining order." 29 U.S.C. § 160(j) (1976).

126. See J. Irving, GENERAL COUNSEL'S REPORT ON UTILIZATION OF 10(j) INJUNCTION PROCEEDINGS JULY 1, 1975, THROUGH JUNE 30, 1979, at 1 [hereinafter cited as GENERAL COUNSEL'S REPORT].

127. *Id.*

128. During the four years covered by the GENERAL COUNSEL'S REPORT, *supra* note 126, the

Section 10(j) is not a panacea, however, and its limitations should be recognized.<sup>129</sup> First of all, the commencement of section 10(j) injunction proceedings requires the Board to demonstrate that its normal remedial processes will be frustrated absent injunctive relief. This may not always be easy to demonstrate. More important, to involve the Board's section 10(j) authority in *Fibreboard*-type cases, the union must be aware that the operational change is imminent or pending. If the employer's plans are not known in advance, both the Board and the Court may be faced with a familiar problem in relocation situations—the difficulty of undoing the *fait accompli*. Thus, in potential section 10(j) situations, just as in regular litigation, the Board must deal with the practical problems of fashioning relief that is just but not unduly burdensome.

All of these considerations beg the underlying issue, however, and that is the courts' refusal to read *Fibreboard* as expansively as the Board has with respect to the obligation to decision-bargain over economically motivated operational changes other than subcontracting. If the circuit courts of appeal are unwilling for whatever reason to enforce Board orders on this point *after* the matter has been fully litigated, the chances that federal district courts will accept the Board's representations after an *ex parte* investigation are at best remote.<sup>130</sup> It is clear, therefore, that without resolution of the tension between the Board and the courts in this area, which may come soon in the Supreme Court,<sup>131</sup> the problem of fashioning effective remedies or, indeed, of resolving the conflicting interests at all, will continue to exist.

#### V. FIBREBOARD, MNCs, AND COLLECTIVE BARGAINING

Until *Fibreboard* II burst on the scene in 1962, the definition of mandatory subjects for bargaining within the statutory phrase "other terms and conditions of employment" was by and large an evolutionary process. Viewed against the background of its historical antecedents, *Fibreboard*, with its potentially sweeping application to a variety of economically motivated decisions heretofore secure within the bastion of "management prerogative," seemed more revolutionary than evolutionary. Today, seventeen years after its affirmation by the U.S. Supreme Court, the controversy that once surrounded *Fibreboard* has diminished. And, in retrospect, if *Fibreboard* has not delivered all that its supporters hoped for, neither has it produced the disastrous results its critics predicted.

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Board authorized 193 § 10(j) proceedings (an average of approximately 48 per year), 13 of which involved "subcontracting or other change to avoid bargain obligation." See GENERAL COUNSEL'S REPORT, *supra* note 126, Appendix B, at 5-6.

129. This problem was explored by Chairman Murphy's Task Force on the NLRB. See the TASK FORCE'S INTERIM REPORT AND RECOMMENDATIONS 77-82 (November 5, 1976).

130. Of the 13 *Fibreboard*-type cases in which § 10(j) relief was authorized during the four years covered by the GENERAL COUNSEL'S REPORT, *supra* note 126, 12 included an alleged violation of § 8(a)(3). Even in § 8(a)(3) cases, however, in which the courts have been more disposed to agree with the Board, it has not always been possible to persuade the courts to grant the petitioned for relief. See GENERAL COUNSEL'S REPORT, *supra* note 126, Appendix B, Situation 3, at 5.

131. See text following note 96 *supra*.

If *Fibreboard* has atrophied since the 1960s, the same cannot be said for MNCs. Operational changes, including subcontracting, closings, and relocations, are not new. Until the end of World War II, however, these changes primarily occurred within the confines of the United States, with a foreign investment limited to supplying natural resources for U.S.-based facilities. The emergence of MNCs over the past thirty years, but particularly during the 1960s, is one of the more complex issues on the current industrial relations scene. The current pre-eminence of MNCs has also created a major foreign trade problem for the United States—a problem that poses the possibility of serious economic consequences for the United States, as well as benefits. MNCs have developed resources in other countries, particularly underdeveloped nations, and have raised standards of living throughout the world. But the accomplishments of MNCs, impressive as they may be, have also raised serious questions, particularly over the impact of MNCs on U.S. jobs.<sup>132</sup>

Given their traditional adversarial relationship, it is not surprising that management and labor have divergent views on the desirability of the growth of MNCs and whether and how MNCs should be regulated.<sup>133</sup> Although the development of *Fibreboard* coincided with the growth of MNCs during the 1960s, American unions, for whatever reasons, have yet to make any real effort to bring the activities of MNCs within the ambit of the National Labor Relations Act.<sup>134</sup> An examination of *Fibreboard* and its progeny suggests that the NLRB could well respond favorably to a union's claim that an employer's decision to relocate to a foreign country is a mandatory subject of collective bargaining within the meaning of section 8(a)(5) of the Act. The judiciary's response would probably be less favorable. Obviously, the ultimate application of the *Fibreboard* doctrine to MNCs is open to speculation.

If *Fibreboard* has atrophied, the problems have not.<sup>135</sup> Nor are they readily solvable whether the plant moves to a different location in or outside of the United States. No one disputes the argument that plant closures and relocations can have a devastating impact on employees. But keeping obsolete and unproductive plants open is not the solution and could have an equally devastating effect on both employers and employees. The problems of plant

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132. See text accompanying note 6 *supra*.

133. The possible success of transnational bargaining is a complex question beyond the scope of this Article.

134. Since Board remedies rarely, if ever, order the work to be returned to the old facility, application of *Fibreboard* to foreign relocations would not necessarily pose possible extraterritorial problems if the Board were to order the reinstatement of an employee whose "protected" union activity and discharge occurred on foreign soil.

135. There have been a number of bills introduced in both the United States Senate and House of Representatives attempting to deal with the problems of plant closures. See, e.g., National Economic Dislocation Prevention Act of 1980, H.R. 7315, 96th Cong., 2d Sess., 126 CONG. REC. 3451 (1980); Employment Maintenance Act of 1980, S. 2400, 96th Cong., 2d Sess., 126 CONG. REC. 2302 (1980); Employee Protection and Community Stabilization Act of 1979, S. 1609, 96th Cong., 1st Sess., 125 CONG. REC. 10975 (1979); National Priorities Act of 1979, H.R. 5040, 96th Cong., 1st Sess., 125 CONG. REC. 6994 (1979). Most of these bills, however, do not address the practical problem of costs.

relocation and the extent and scope of the collective-bargaining obligation will continue in the evolving economy of the 1980's. Since these problems will not disappear, they must be resolved before other related problems such as our declining productivity rate can be solved.



